IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1978

No. 78-863

Triple A Machine Shop, and Mission Equities Insurance Group,

Petitioners,

vs.

Director, Office of Workers' Compensation Programs, United States Department of Labor, and Octavio Cordero,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KATHRYN E. RINGGOLD
AIROLA & RINGGOLD
995 Market Street
San Francisco, CA
94103

Attorneys for
Respondent, Octavio
Cordero.

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1978

No. 78-863

Triple A Machine Shop, and Mission Equities Insurance Group,

Petitioners,

vs.

Director, Office of Workers' Compensation Programs, United States Department of Labor, and Octavio Cordero,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KATHRYN E. RINGGOLD
AIROLA & RINGGOLD
995 Market Street
San Francisco, CA
94103

Attorneys for
Respondent, Octavio
Cordero.

JURISDICTION

Jurisdiction on the Writ of Certiorari is limited to the considerations as set out in Rule 19 of the Supreme Court of the United States. The holding of the Court of Appeals for the Ninth Circuit turned on the finding that there was nothing in the record to indicate that the claimant's condition was known or even available to the employer. This holding is consistent with the decisions rendered by the Courts of Appeal for the Third Circuit, Fifth Circuit, and the District of Columbia Circuit which defines disability under the new §8(f) as encompassing a serious physical disability such that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-

related accident and compensation liability.

STATEMENT OF THE CASE

Prior to the hearing in this case, the Administrative Law Judge granted a motion by the Petitioner to join as Respondents eighteen of the Claimant's former employers. At the hearing of April 9, 1975, the Administrative Law Judge dismissed two of the Claimant's former employers; the remaining sixteen Respondents made no appearance at the hearing. Petitioners did not appeal the Order of Dismissal.

Respondent Octavio Cordero worked as a welder for approximately 30 years. During this period, he was exposed to fumes in enclosed areas. The Administrative Law Judge found that the Claimant was totally and permanently disabled as the result of the

cumulative effect of breathing fumes in connection with his employment. Respondent Cordero worked for Petitioner from May, 1972 to August, 1972 and again from October 17, 1972 to October 19, 1972. He was unemployed during the interim period. The Benefit's Review Board upheld the decision of the Administrative Law Judge on the basis that there was nothing in the record to indicate that the petitioning employer was aware of the Respondent's breathing condition at the time he was hired either in May, 1972 or October, 1972. The United States Court of Appeals, Ninth Circuit, denied the Petition for Review and affirmed the Order of the Benefit's Review Board, noting specifically that there was nothing in the record to indicate that Respondent's condition was known

or even available to the Petitioners.

ARGUMENT

I

The Writ should be denied since the holding of the Court of Appeals, Ninth Circuit is not in conflict with the decision of the other Court of Appeals on the same matter. In affirming the Order of the Benefit's Review Board, the Court of Appeals for the Ninth Circuit quoted from Dillingham Corp. v. Massey, 505 F.2d 1126 (CA9 1974) as follows:

> "However, Congress did not intend that all pre-existing conditions come under coverage by the Fund, but only those 'manifest' at the time of initial employment. (citation omitted). A condition which is not manifest to a prospective employer cannot qualify as a previous disability. (citation omitted). Thus, the key to the issue is the availability to the employer

> of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it. (citation omitted)."
> ID. at 1128.

The Ninth Circuit then noted that here, there is nothing in the record to indicate that Claimant's condition was known or even available to the Petitioners. While there was evidence that the Claimant had symptoms of chest problems as early as 1967, there was no evidence that his coughing affected his ability to work or to fully perform the functions of his employment.

In affirming the Order of the Beneift's Review Board, the Court of Appeals for the Ninth Circuit also referred to Atlantic and Gulf Stevedoring, Inc. v. Director, etc., 542 F.2d 602 (CA 3, 1976) and noted

specifically that in that case the employer was fully aware of the medical problems of the decedent at the time of the employment. The Court distinguished Atlantic and Gulf Stevedoring, Inc. v. Director, etc. (supra) again noting that there was no finding in the record of the instant case that the employer was aware of any medical problems of the decedent at the time of the employment.

The Petitioners state as a reason for granting the Writ that the Decision of the Court of Appeals for the Ninth Circuit was further in conflict with C & P Telephone Telephone Co. v. Director, Office of Workers' Compensation Programs, 564 F.2d 503 (D.C. Cir. 1977). In that case, the Court stated the following:

> "To summarize, the

> term 'disability' in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new §8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability."

In granting the employer's Petition, the Court noted specifically that the record supported a finding that the Claimant's back problems "were known to the employer." Consistent with the decision of the Court of Appeal for the D.C. Circuit, the Court of Appeals for the Ninth Circuit has based its finding on the fact that

there is nothing in the record to indicate that the Claimant's condition was known or even available to the employer at the time of the hire. There is nothing in the record to reflect that the Court of Appeals for the Ninth Circuit based its decision on an economic concept of disability. Since there is no conflicting law among the Circuit Courts, the Petition for Writ of Certiorari should be denied.

II

Petitioner's request that this Honorable Court take a fresh look at the "last carrier" rule which was established in Travelers v. Cardillo, 225 F.2d 137 (2d CIR. 1955), CERT. denied 350 U.S.913, 100 L.Ed 800 76 S.Ct.196. It should be noted that Petitioner's did not appeal the Order of Dismissal of the Respondent's other

employers and their workers' compensation carriers. These former employers are parties who have an interest in this action and are not presently before this Court because of the Petitioner's failure to object to their dismissal. The Respondent therefore submits that this case is not a proper one for review of the"last carrier" rule.

As noted in the opinion of the Court of Appeal for the Ninth Circuit, the Second Circuit recently reviewed the Cardillo decision in General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208 (CA2 1977) and saw no reason to depart from "Judge Medina's searching and perceptive analysis of the 'last carrier' rule." The General Dynamics Corp. Court stated as follows:

"Cardillo has been

> the law of this Circuit for more than two decades; it has been followed by the Board; and we have found no contrary law in other circuits. During this long period of consistent judicial application, Congress has not amended the Act. to provide for a different rule." (emphasis supplied).

On Page 8, Petitioner's refer to a compensation rate of $396.78 per week. It should be noted that the date of injury, October 19, 1972, is prior to the effective date of the amended Longshore and Harborworkers Act. The liability for the Petitioner in this case is $70.00 per week. While percentage increases are allowable, under §10(h)(1) of the Amended Act, the increases over the $70.00 base are reimburseable from the Special Fund. Further, the Petitioner's state that the liability is the result of three

day's of exposure with its employer. Again, it should be noted that the period of employment with the employer was sporadic up to 1972, for the period of May, 1972 to August, 1972 and again for the period October 17, 1972 through October 19, 1972. During that period of employment, the Claimant incurred an injurious exposure to fumes, the cumulative effect of which was permanent damage to his lungs. We submit that it does not violate due process of law to place full liability on one of the several employers responsible for the Claimant's lung condition.

CONCLUSION

For the reasons as stated above, Respondent respectfully prays that the Writ of Certiorari be denied.

Dated, San Francisco, California,

December 28, 1978.

Respectfully submitted,

KATHRYN E. RINGGOLD
AIROLA & RINGGOLD
Attorneys for
Respondent Ocatvio
Cordero.

SERVICE SHEET

BRB No. 76-113: Octavio Cordero v. Triple A Machine Shop and Mission Equities Insurance Group (Case No. 75-LHCA-153)

Copies of this Brief have been served on the following parties:

Gerald A. Falbo, Esq.
Sedgwick, Detert, Moran & Arnold
Suite 1100, 111 Pine Street
San Francisco, CA 94111

Gerald Cullen
Deputy Commissioner
U.S. Department of Labor/ESA/OWCP
450 Golden Gate Avenue, Box 36066
San Francisco, CA 94102

Miss Laurie M. Streeter
Associate Solicitor
U.S. Department of Labor
Suite N-2716, NLB
Washington, D.C. 20210

Mr. John W. Earman
Administrative Law Judge
1111-20th Street, N.W., Suite 720
Washington, D.C. 20036

Mr. Herbert A. Doyle
Director, Office of Workers' Compensation Programs
U.S. Department of Labor
New Labor Building, Suite S-3524
Washington, D.C. 20210

Mr. Octavio Cordero
20 Joy Street, San Francisco, CA 94110